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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.129 OF 2007
WITH
CIVIL APPLICATION NO.1678 OF 2006

Shankar Kalgonda Patil ...Appellant
V/s.
Mahadeo Balgonda Patil & Ors. ...Respondents

Mr.P.M. Arjunwadkar, Advocate, for the Appellant.

Mr.A.A. Kumbhakoni, Associate Advocate General with Mr.T.D. Deshmukh, Advocate, for Respondent Nos.1 to 4.

CORAM : ABHAY S. OKA, J.

DATE : 23RD NOVEMBER, 2007.

P.C.:

1. Heard Shri.Arjunwadkar, Advocate, appearing for the appellant and Shri.Kumbhakoni, Associate Advocate General, appearing for the 1st respondent.

2. The Suit for perpetual injunction filed by the appellant-plaintiff was decreed by the Trial Court. The said decree has been reversed by the Appellate Court in an Appeal preferred by the respondents.

3. The submission of the learned Advocate for the appellant is that there is no dispute between the parties that the father of the appellant Kalgonda had

two brothers by name Balgonda and Apgonda. The respondents are the legal representative of the deceased Balgonda. It is submitted that in the cross-examination it was admitted by the witness of the respondents that all the joint family properties were partitioned earlier except the suit property. It is submitted that the Appellate Court has committed an error by holding that there is no specific plea in the plaint that the appellant was allotted the suit property as his share in the partition. It is submitted that though name of appellant's father appeared in the revenue record by showing him as Karta, later on there is a mutation entry in favour of the appellant which records his exclusive possession. It is submitted that the burden is on the respondents to prove that suit property was excluded from partition.

4. I have carefully considered the submissions. In paragraph 3 of the plaint, the appellant has referred to partition which had taken place between himself and his three brothers and mutation entry effected on the basis of the said partition. What is not pleaded is that there was earlier partition between the members of the larger family in which the suit property was allotted to the share of appellant's

father Kalgonda. Thus, what has been found by the Appellate Court in paragraph 8 of its judgment is that the appellant-plaintiff has not specifically pleaded that the suit property was allotted to the share of his father in the alleged partition between appellant's father and his brothers. In that context, the Appellate Court has referred to the entries made in the revenue record after demise of appellant's grandfather of the name of his father as a Karta of the joint family. In the context of the said entry in revenue records, the Appellate Court came to the conclusion that the appellant has not proved that in partition which had taken place prior to the year 1970, the suit property was allotted to the share of father so that in a subsequent partition amongst the appellant and his brothers, the suit property could be allotted to the share of the appellant.

5. In view of failure of the appellant to plead in the plaint that the suit property was allotted to the share of his father and in view of revenue entries showing the appellant's father as Karta of the joint family, the Appellate Court has recorded a finding of fact and has not accepted the case of exclusive possession made out by the appellant. It is not possible to interfere with the said finding which is

based on pleadings and evidence available on record. No substantial question of law arises.

6. The Second Appeal stands dismissed.

7. In view of the dismissal of the Second Appeal, the Civil Application therein does not survive and the same is disposed of.

[ABHAY S. OKA, J.]